No. 12,469

In the United States Court of Appeals for the Ninth Circuit

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, APPELLANT

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, MCNEILL AND LIBBY, FRANK MCCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC., APPELLEES

APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, FOURTH DIVISION

BRIEF FOR THE APPELLANT

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INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

This is an appeal from a judgment on the mandate of the Supreme Court entered by the district court on September 19, 1949, permanently enjoining the appellant and others from enforcing certain orders and regulations of the Secretary of the Interior with respect to fishing in Alaskan coastal waters (R. 78-80). Notice of appeal was filed November 17, 1949 (R. 82). The juris-

diction of the district court was invoked under the Act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. sec. 101, 41 Stat. 1203. The jurisdiction of this Court rests on 28 U.S.C. sec. 1294(2).

QUESTION PRESENTED

Whether the district court contravened the mandate of the Supreme Court by ruling that the Secretary of the Interior had not taken timely steps to comply with the determinations of the Supreme Court and, therefore, permanently enjoining enforcement of the repealed Alaska Fisheries Regulation 208.23(r) and any other regulation of substantially like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise.

STATEMENT

This action was instituted by the appellees on June 25, 1946, to have declared invalid Public Land Order No. 128, 8 Fed. Reg. 8557, wherein the Secretary of the Interior, on May 22, 1943, included in the Karluk Indian Reservation on Kodiak Island, Alaska, coastal waters extending 3,000 feet from the shore line. In addition, the action sought to enjoin the enforcement of Alaska Fisheries Regulation 208.23(r), Title 50, C.F.R., 11 Fed. Reg. 3105, issued by the Secretary of the Interior on March 22, 1946, wherein he set apart the same waters as a reserved fishing area, under the White Act of June 6, 1924, 43 Stat. 464, as amended June 18, 1926, 44 Stat. 752, 48 U.S.C. secs. 221-228, and closed it to all fishing except by natives in possession of such reservation and their licensees (Orig. Rec. 2-18).[1]

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[1] This Court authorized consideration of the printed record in No. 11,585, the first appeal in this case, as a part of the record in the instant appeal without reprinting (R. 92-94). References to that original record are designated as "Orig. Rec." as distinguished from "R." which refers to the new matter printed for the instant appeal, No. 12,469.

The district court granted a preliminary injunction on July 18, 1946, prohibiting enforcement of Alaska Fisheries Regulation 208.23(r) (Orig. Rec. 37). Thereafter, following trial of the issues, it found both the Land Order and the Fisheries Regulation to be invalid and made the temporary injunction permanent on November 6, 1946 (Orig. Rec. 40).

On appeal by Frank Hynes, this Court affirmed the district court on November 21, 1947. *Hynes* v. *Grimes Packing Co.,* 165 F. 2d 323.

Thereafter the Supreme Court upheld the inclusion by the Secretary of the Interior of coastal waters in the Karluk Indian Reservation by Public Land Order 128, but declared invalid the Alaska Fisheries Regulation 208.23(r). In addition, it held that the Indians could charge license fees for fishing in those waters of their reservation, but that such fees should not exceed the estimated approximate cost of policing the area. However, rather than remanding the case with instructions as to the precise orders to be entered the Supreme Court said (R. 53-55):

> This is an equitable proceeding in which the respondents seek protection against unlawful action by petitioner, the Regional Director of the Fish and Wildlife Service of the Department of the Interior. The interests of respondents, the Indians of Karluk Reservation, and the efforts of the Department of the Interior to administer its responsibilities fairly to fishermen and Indians are involved. These are questions of public policy which equity is alert to protect. This Court is far removed from the locality and cannot have the understanding of the practical difficulties involved in the conflicts of interest that is possessed by the District Court. Therefore we think it appropriate for us to refrain from now entering a final order disposing definitively of the controversy. With our conclusion on the law as to the establishment of the reservation and the in-

validity of the regulation before them, the Department and the parties should have a reasonable time, subject to the action of the District Court on the new proposals, to adjust their affairs so as to comply with our determinations.

We therefore vacate the decrees of the District Court and the Court of Appeals and remand this proceeding to the District Court with directions to allow thirty days from the issuance of our mandate for the Secretary of the Interior to give consideration to the effect of our decision. Unless steps are taken in this proceeding the District Court, on the expiration of thirty days, shall enter a decree enjoining the defendant Hynes and all acting in concert with him, substantially as ordered in the permanent injunction entered November 6, 1946. If timely steps are taken, the District Court will, of course, be free to enter such orders as it may deem proper and not inconsistent with the present decision. Pending the entry of further orders by the District Court, the preliminary injunction entered July 18, 1946, shall apply to protect the rights of the respondents.

On June 13, 1949, before issuance of the mandate and pursuant to the requirement in the opinion that "timely steps" be taken to comply with the Supreme Court's determinations, the Secretary of the Interior ordered Regulation 208.23(r)[2] to be deleted from the Alaska Fisheries Regulations (R. 74). The amendment by deletion is set forth at page 3283 of 14 Federal Register, June 17, 1949, and a copy of it is printed in the appendix hereto, *infra,* p. 12.

The mandate of the Supreme Court issued to the district court on July 1, 1949, "with directions and for proceedings in conformity with the opinion of this court" (R. 67-69). It was spread upon the records of

[2] This regulation had been redesignated as paragraph (r) of section 108.24 of the then current regulations. 13 Fed. Reg. 8695.

the district court on July 20, 1949 (R. 69). On that date, the appellant, Frank Hynes, in order to be within the thirty days from issuance of the mandate allowed by the Supreme Court for the taking of timely steps "in this proceeding," moved the district court for an order dissolving the temporary and permanent injunctions and dismissing the action on the ground that the invalid regulation had been deleted so that there was no longer need for the injunctive relief sought in the cause (R. 70-74).

The Secretary of the Interior in compliance with the Supreme Court's decision proposed and on July 25, 1949, the Council of the Native Village of Karluk approved and passed an amended ordinance providing for the issuance of licenses without discrimination, except that the two dollar license fee for residents of Alaska was continued and the license fee for commercial fishing by non-residents was reduced from forty dollars per person per annum to five dollars. The ordinance prohibited fishing without such a license but did not continue the five hundred dollar fine previously provided. A copy of this ordinance, approved by the Secretary of the Interior on September 8, 1949, is printed in the appendix, *infra,* pp. 12-13; cf. R. 50-51.

Subsequently, on September 19, 1949, the appellees filed a motion in the district court entitled "Motion for Judgment on the Mandate" wherein they sought entry of a decree "enjoining the defendant Hynes and all acting in concert with him in accordance with the terms of the permanent injunction entered herein on November 6, 1946" (R. 75-76). They represented such action to be in accord with the opinion and mandate of the Supreme Court (R. 76).

On the same day, the district court denied appellant's motion for dismissal and granted appellees' motion for a permanent injunction (R. 76-77). Judgment on the

mandate was entered on September 19, 1949, in which the court ruled that "no steps were taken in this proceeding in accordance with the decision of the Supreme Court and the mandate entered thereon" (R. 79). It granted a permanent injunction enjoining appellant and all others in concert with him from enforcing the repealed regulation or "any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise" (R. 80).

Appellant thereupon applied to the Supreme Court for a writ of mandamus directing the district court (a) to vacate the judgment on the mandate enjoining appellant and others acting in concert with him from enforcing the repealed regulation or any other regulations of like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise, (b) to dissolve the temporary injunction, and (c) to dismiss the action in accordance with the opinion and mandate of the Supreme Court. The application was denied by the Supreme Court on January 9, 1950, on authority of *Ex Parte Fahey,* 332 U. S. 258 (1947), which holds that the Supreme Court will not entertain an original proceeding for mandamus where there is an adequate remedy by appeal to the Court of Appeals. *Hynes, Regional Director* v. *Pratt,* 338 U. S. 908.

This appeal, noted on November 17, 1949, was then perfected (R. 82, 84).

SPECIFICATION OF ERRORS

The statement of points relied upon by Frank Hynes on this appeal (R. 90-91) may be summarized as follows:

The district court erroneously contravened the mandate of the Supreme Court:

(a) By enjoining Frank Hynes and others acting in concert with him from enforcing the repealed regulation or any other regulations of like import which may hereafter be promulgated by the Department of the Interior through its Fish and Wildlife Service or otherwise.

(b) By refusing to dismiss the temporary injunction entered July 18th, 1946.

(c) By refusing to dismiss the action.

ARGUMENT

The District Court's Judgment on the Mandate Is Contrary to the Mandate of the Supreme Court

The Supreme Court vacated the permanent injunction entered by the district court on November 6, 1946 (R. 54). It allowed the parties thirty days from issuance of the mandate "to adjust their affairs so as to comply with our determinations" (R. 54). Those "determinations" were that the establishment of the Indian Reservation including coastal waters was valid, that Alaska Fisheries Regulation 208.23(r) was invalid, and that the license fees for fishing in the reservation waters should not exceed an estimated approximate cost of policing the area (R. 41, 47, 49-50, 52, 54).

It directed the district court to enter an injunction substantially like the one of November 6, 1946, *only* if timely steps were not taken to comply with those determinations. The Supreme Court expressly refused to direct the hand of the Secretary of the Interior and alerted the district court to the same restraint. This cautioning of the district court appears, in addition to the express language of the opinion, from the cases cited in footnote 60, R. 55, to the sentence direct-

ing a permanent injunction if no steps were taken by the Secretary. All of those cases emphasize judicial self-restraint from interfering in administrative matters.

The Supreme Court, of course, left the district court free "to enter such orders as it may deem proper." But these orders were to effectuate adjustment by the parties of their problems to comply with the Supreme Court's determinations. They were not to be "inconsistent with the present decision" (R. 55).

Plainly, the prompt deletion of Alaska Fisheries Regulation 208.23(r) from the current regulations prior to issuance of the mandate and the changes effected in the ordinance [3] of the Karluk Village within thirty days after issuance of the mandate constituted timely steps eliminating threat of enforcement of the regulation or excessive license fees in full compliance with the decision of the Supreme Court. Certainly, in view of the Supreme Court's forebearance to direct the action to be taken by the Secretary of the Interior, he was not compelled to issue a new set of regulations or to work out some complicated plan if, in his opinion, the interests of the Indians and of fish conservation did not require it.

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[3] The new ordinance was not introduced in evidence in the court below. However, it represents the official act both of an incorporated village in Alaska and of the Secretary of the Interior. Either is a proper subject of judicial notice. Alaska Compiled Laws, 1933, sec. 3441; Act of June 18, 1934, secs. 10, 16 and 17, 48 Stat. 984, 986, 987, 988; Act of May 1, 1936, sec. 1, 49 Stat. 1250; *Caha* v. *United States,* 152 U.S. 211, 221-222 (1894); *Tucker* v. *Texas,* 326 U.S. 517, 519 (1946); *Labor Board* v. *Atkins Co.,* 331 U.S. 398, 406 (1947); *Sprinkle* v. *United States,* 141 Fed. 811, 819-820 (C.C.A. 4, 1905); *Milwaukee Mechanics Ins. Co.* v. *Oliver,* 139 F. 2d 405, 407 (C.C.A. 5, 1944). That introduction of the ordinance in evidence in the district court would not have affected its ruling is apparent from the fact that the appellees did not assert excessiveness of the license fees and the district court did not enjoin enforcement of those either previously or presently required.

It is not known, nor did the district court suggest, what additional action the Secretary was expected to take on behalf of the appellees. The decision of the Supreme Court required none. It was sufficient, under the opinion, that the Secretary "give consideration" to the matter and make a decision as to his course of action not inconsistent with the opinion and within the time allowed (R. 54). He did that. Further forcing of the hand of the Secretary is an unwarranted invasion by the court into the executive functions of the Government. "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." *Decatur* v. *Paulding,* 14 Pet. 497, 516 (1840). Thus the district court's ruling that "no steps were taken in this proceeding in accordance with the decision of the Supreme Court" is both erroneous in fact and a patent misconstruction of the decision. Accordingly, its judgment on the mandate enjoining enforcement of the repealed regulation because further steps were not taken is contrary to the mandate of the Supreme Court. Apparently appellees will be satisfied with nothing short of the permanent injunction originally decreed. But the Supreme Court held in vacating that injunction that they were not entitled to it.

Moreover, the judgment of the district court further contravenes the mandate in enjoining enforcement of "any other regulations of like or substantially like import which may hereafter be promulgated or attempted to be promulgated by the Department of the Interior of the United States of America through its Fish and Wildlife Service or otherwise." That injunction, purportedly on the basis of the mandate, goes wholly beyond the mandate or the relief sought at any

time. The question of future regulations by the Fish and Wildlife Service was not in the record and was not reviewed by the Supreme Court. Control of future regulations was not asked for in the complaint. It was not in the original injunctions and, accordingly, does not meet the requirement of the Supreme Court that any new injunction be "substantially as ordered" in the original permanent injunction. Finally, it was not even asked for in appellees' motion for judgment pursuant to which it was decreed (R. 75-76).

Even more remote to the scope of this case are *future* regulations issued by authority *other* than the Fish and Wildlife Service. An injunction of such broad range unwarrantedly stands athwart many otherwise valid and essential regulations of the Department of the Interior. For example, it is now uncertain whether the Secretary may promulgate and enforce regulations, under present or future authority other than the White Act, relative to trespass and interference with the Indians on the waters of the legally established Karluk Indian Reservation.

There has been no threat to promulgate and enforce a regulation "like or substantially like" the one which the Supreme Court held invalid. No such threat was averred by the appellees and no evidence was offered to or suggested by the district court as a basis for its ruling. On the contrary, the existence of the decision of the Supreme Court and the deletion of the objectionable regulation are strong evidence that no such threat exists. The Courts "must assume that the Administrator will * * * act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority." *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 620 (1944).

CONCLUSION

For the foregoing reasons, it is submitted that the case should be remanded to the district court with directions (a) to vacate its judgment on the mandate, (b) to dissolve the temporary injunction and (c) to dismiss the action.

Respectfully,

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APRIL 1950.

APPENDIX

[Federal Register of June 17, 1949, 14 F. R. 3283]

TITLE 50—WILDLIFE

Chapter 1—Fish and Wildlife Service, Department of the Interior

Subchapter F—Alaska Commercial Fisheries

PART 108—KODIAK AREA, CLOSED WATERS

Basis and purpose. Because of the Supreme Court's decision dated May 31, 1949, in the case of "Hynes v. Grimes Packing Co. et al." respecting the validity of paragraph (r) of § 208.23 of the Alaska commercial fisheries regulations for 1946, which has been redesignated as paragraph (r) of § 108.24 of the current Alaska commercial fisheries regulations (13 F. R. 8695), the following action is taken, to become effective immediately upon publication in the FEDERAL REGISTER:

Paragraph (r) of § 108.24 of Part 108 is deleted.

(34 Stat. 263, 478, as amended, 43 Stat. 464, as amended; 48 U. S. C. 221-247.)

Dated: June 13, 1949.

[SEAL.] WILLIAM E. WARNE,
Assistant Secretary of the Interior.

AN ORDINANCE

"SECTION 1. That it shall be unlawful for any person, partnership, firm, association or corporation, to fish for, take or catch any fish, or to operate any fishing vessel, gear equipment within the waters of the Karluk Reservation except under a permit issued by the Native Village of Karluk, for which the fee shall be as follows:

"(A) For residents of the Territory of Alaska $2.00

"(B) For non-residents of the Territory of Alaska $5.00

Provided further, that a person to qualify for a resident (Class A) permit must have resided in the Terri-

tory of Alaska for three consecutive years prior to the date of his application, or request, for a permit.

"SECTION 2. The possession of fish upon any vessel within said waters without a permit shall constitute prima facie evidence of a violation of this ordinance.

"SECTION 3. The grant of a permit pursuant to section 1 hereof for the operation of any fishing vessel, gear, or equipment shall extend to all persons operating such vessel, gear, or equipment for the purpose of fishing under the direction of the permittee.

"SECTION 4. Any person violating this ordinance may be treated as a trespasser, may be removed from the reservation, and if his permit is revoked, shall be ineligible in the future to obtain a permit.

"SECTION 5. The Council of the Native Village of Karluk shall approve the form of permit to be issued hereunder, and permits shall be issued by the Council, or a person duly designated by it.

"SECTION 6. This ordinance shall become effective immediately upon its passage and approval."

Passed and approved this date of July 25, 1949.

Approved:

(S.) LARRY ELLANAK,
President, Native Village of Karluk, Alaska.

Attest:

(S.) CHARLES CHRISTENSEN,
Secretary, Native Village of Karluk, Alaska.

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